No. 94-562

In the Supreme Court of the United States

OCTOBER TERM, 1994

LESLIE WILTON, ON BEHALF OF HIMSELF AND AS A REPRESENTATIVE OF CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, AND CERTAIN INSTITUTE OF LONDON UNDERWRITERS COMPANIES, AS FOLLOWS, THE ORION INSURANCE COMPANY, PLC, SKANDIA U.K. INSURANCE PLC, THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE, LTD., OCEAN MARINE INSURANCE CO., LTD., YORKSHIRE INSURANCE CO., LTD., MINISTER INSURANCE CO., LTD., PRUDENTIAL ASSURANCE CO., LTD., PEARL ASSURANCE PLC, BISHOPSGATE INSURANCE LTD., HANSA MARINE INS. CO. (UK), LTD., VESTA (UK) INS. CO., LTD., NORTHERN ASSURANCE CO., LTD., CORNHILL INSURANCE CO., LTD., SIRIUS INSURANCE CO. (UK), LTD., SOVEREIGN MARINE & GENERAL INSURANCE CO., TOKIO MARINE & FIRE INSURANCE (UK), LTD., TAISHO MARINE & FIRE INSURANCE CO. (UK), LTD., STOREBRAND INSURANCE CO. (UK), LTD., ATLANTIC MUTUAL INSURANCE CO., ALLIANZ INTERNATIONAL INSURANCE CO., LTD., and WAUSAU INSURANCE CO. (UK), LTD.,

Petitioners,

v.

SEVEN FALLS COMPANY, MARGARET HUNT HILL, ESTATE OF A. G. HILL, LYDA HILL, ALINDA H. WIKERT, and U.S. FINANCIAL CORP.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR *AMICUS CURIAE* INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION IN SUPPORT OF PETITIONERS

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39

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF FOR *AMICUS CURIAE* INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

In this case, the Court is asked to depart from the principles in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) to routinely permit abstention in federal declaratory judgment actions whenever a parallel state proceeding is present. This case is of great practical importance to the members of the Insurance Environmental Litigation Association ("IELA"), which are most of the nation's major property-casualty insurers.[1] IELA members need to be able to seek declaratory relief in federal court. Local passions can run deep in disputes about who should pay to clean up pollution that may alarm in-state residents and drain the treasuries of local companies and governments. Out-of-state or foreign insurers, such as IELA's members, may be seen as a "deep pocket," without local influence, capable of picking up the tab for the clean-up.

In IELA's experience, although most state courts strive in good faith to produce just results, some succumb to

[1] Since 1986, IELA has participated as *amicus curiae* in more than 300 cases addressing environmentally related insurance coverage issues. IELA submits this brief on behalf of IELA members: Aetna Casualty & Surety Company; Allstate Insurance Company; AIG Insurance Companies; American States Insurance Company; Chubb & Sons, Inc.; CIGNA Property & Casualty Companies; Continental Insurance Companies; Envision Claims Management Corporation (formerly Crum & Forster Corporation); Fireman's Fund Insurance Companies; Hanover Insurance Company; Hartford Insurance Group; Home Insurance Company; Liberty Mutual Insurance Company; Maryland Insurance Group; Prudential Reinsurance Company; Royal Insurance Company; St. Paul Companies; Selective Insurance Company of America; State Farm Fire & Casualty Company; Travelers Insurance Company; United States Fidelity & Guaranty Company; and Zurich-American Insurance Group.

the temptation of relieving a local governmental entity or business from the burden of cleaning up pollution without regard to the terms of insurance contracts. For example, one trial judge held that " 'the health, safety and welfare of the people of this State must outweigh the express provisions of the insurance policy in issue.' " *Summit Assocs., Inc. v. Liberty Mut. Fire Ins. Co.*, 550 A.2d 1235, 1239 (N.J. Super. Ct., App. Div. 1988) (reversing and quoting trial court).

In addition, disputes about where a case should be litigated are particularly common in environmental coverage cases, which involve numerous contacts with multiple jurisdictions.[2] The determination of which law applies is frequently outcome-determinative and major property and casualty insurers are susceptible to being sued in most, if not all, state forums. The protections against local bias afforded to litigants by federal courts are especially important in such cases. Giving insurers access to a federal forum in these disputes fulfills Congress's purposes in adopting diversity jurisdiction, allowing for removal, and enacting the Declaratory Judgment Act (the "Act").[3]

SUMMARY OF ARGUMENT

By adopting the Declaratory Judgment Act, diversity jurisdiction, and allowing for removal, Congress has constrained the discretion of federal courts to abstain from a suit for declaratory relief involving an out-of-state entity. To the extent judicial discretion to abstain survives Congress's enactments, it is because such discretion is part of the "common law background against which the statutes

[2] *See, e.g., Waste Management, Inc. v. Admiral Ins. Co.*, 649 A.2d 379 (N.J. 1994) (environmental coverage case involving Waste Management and 54 subsidiaries against 150 insurers concerning coverage for 97 sites in 22 states and Canada); *Westinghouse Elec. Corp. v. Liberty Mut. Ins. Co.*, 559 A.2d 435 (N.J. Super. Ct., App. Div. 1989) (environmental coverage case involving 144 insurers covering 81 contamination sites in 23 states for the period of 1948-82).

[3] Both parties have consented to IELA's participation as *amicus curiae*. Letters of consent have been filed with the Clerk's office.

conferring jurisdiction" were adopted. *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 359 (1989). The *Colorado River/Moses H. Cone* factors, by setting forth the "exceptional circumstances" that may warrant abstention, embody these traditional equitable concepts. As this Court has repeatedly declared, federal courts have an "unflagging obligation" to hear cases over which they have jurisdiction, and may abstain only under "exceptional circumstances." *Colorado River*, 424 U.S. at 817, 813.

In this case, not only did the lower courts fail to undertake a searching review of the *Colorado River* and *Moses H. Cone* factors, but neither of their cursory, unpublished opinions even cited these cases. Instead, the courts below adopted an approach that would transform a situation *always* present in *Colorado River* abstention cases—a concurrent state proceeding—into an "exceptional circumstance."

Depriving litigants of a federal forum whenever a parallel state action is filed would contravene Congress's will. The lower courts cited concerns about "piecemeal litigation" and "reward[ing] . . . forum shop[ping]."[4] But in granting out-of-state parties the right to seek declaratory relief in federal court, Congress understood that concurrent litigation could result, and that the federal courts' workload could increase. Moreover, while federal courts plainly retain the authority to guard against tactical maneuvering to secure a favorable forum, here Lloyd's simply filed a suit in a forum Congress explicitly afforded it, before Seven Falls sued in its preferred forum.

Concerns about bias and the perception of bias in state courts led the First Congress to give the federal courts authority over suits between citizens of a state and out-of-state parties. Congress has frequently examined, and

[4] *Wilton v. Seven Falls Co.*, No. H-93-531, Joint App. 25 (S.D. Tex. July 2, 1993) ("Wilton"). "Joint App." refers to the Joint Appendix submitted by Petitioners Wilton, et al., and Respondents Seven Falls Company, et al., to accompany their briefs on the merits.

repeatedly affirmed, the role of diversity jurisdiction as a safeguard for non-local litigants. The right of an out-of-state entity to remove cases to federal courts complements diversity jurisdiction by ensuring that out-of-state defendants are afforded an opportunity to choose an unbiased forum in the federal courts.

The Declaratory Judgment Act further opens the doors of the federal courts for relief. It enables parties to bring disputes to the federal courts when they first arise, before either side has taken an irrevocable action or incurred avoidable cost. The Declaratory Judgment Act gives a federal court discretion to refuse relief on the merits or for reasons of justiciability. But the Act does not confer discretion on federal courts simply to decline jurisdiction in favor of a state forum, as the court below did.

The concerns that led to the enactment of diversity jurisdiction, removal procedures, and the Declaratory Judgment Act remain today. Authoritative studies of lawyers and judges reveal a widespread perception of bias in state courts against out-of-state parties, particularly corporate and insurance interests. The Court should reject any approach that allows federal district courts to negate the still-necessary and congressionally mandated protections of diversity jurisdiction, removal, and the Declaratory Judgment Act.

ARGUMENT

I. IN DECIDING WHETHER TO ABSTAIN IN A SUIT FOR DECLARATORY RELIEF, FEDERAL DISTRICT COURTS SHOULD EMPLOY THIS COURT'S *COLORADO RIVER* ANALYSIS.

Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821); *see also New Orleans Public Service*, 491 U.S. at 358. The "constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction" does not, however, eliminate "the federal court's discretion in determining *whether to grant certain types of relief*." *Id.* at 359 (citation omitted) (emphasis supplied). The Court's absention jurisprudence recognizes this discretion and sets forth the standards for exercising it in cases such as *Colorado River* and *Moses H. Cone*.[5]

There is no justification for departing from these well-established standards when assessing whether to abstain from actions filed under the Declaratory Judgment Act. Seven Falls is simply wrong in suggesting that the use of the word "may" in the Act confers broader discretion over the exercise of jurisdiction by federal courts in declaratory judgment actions. 28 U.S.C. section 2201(a) (1988 & Supp. V. 1993) (federal courts "*may* declare the rights and other legal relations of interested parties"). The word "may" permits a court to decline or grant declaratory relief on the merits. *Banas v. Dempsey*, 742 F.2d 277, 283 n.9 (6th Cir. 1984), *aff'd*, 474 U.S. 64 (1985) or to deny anticipatory relief on justiciability grounds. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969). The word "may" does not, however, permit a court to decline *jurisdiction*.

Colorado River and *Moses H. Cone* make clear that the "classes of cases" in which a federal court may decline to review an out-of-state entity's request for relief are "the exception, not the rule." *Colorado River*, 424 U.S. at 813; *Moses H. Cone*, 460 U.S. at 14-15. Only after a searching review of the *Colorado River/Moses H. Cone* factors may a federal court determine that abstention is warranted.[6] The Fifth Circuit's approach would allow

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[5] The decision to abstain, though based on the facts of the particular case, is a purely legal determination. Review of that decision, therefore, must be based on a searching examination *de novo*. A district court cannot be permitted unfettered discretion to abrogate its responsibility to decide cases that are clearly within federal jurisdiction. *Moses H. Cone*, 460 U.S. at 19.

[6] *Employers Ins. of Wausau v. Missouri Elec. Works, Inc.*, 23 F.3d 1372, 1374-75 (8th Cir. 1994); *Villa Marina Yacht Sales v. Hatteras Yachts*, 915 F.2d 7, 16 (1st Cir. 1990); *General Reinsurance Corp. v. Ciba-Geigy Corp.*, 853 F.2d 78, 81 (2d Cir. 1988);

federal district courts routinely to dismiss a declaratory judgment action due to "the existence of a pending state court proceeding in which the issues might be fully litigated." *Wilton v. Seven Falls Co.*, No. 93-2608, Joint App. 29 (5th Cir. July 2, 1993). That approach would eviscerate Congress's judgment and this Court's admonitions.

A. The *Colorado River* Factors Are Closely Tied To The Considerations Traditionally Employed By Courts Of Equity In Deciding Whether To Grant Declaratory Relief.

Declaratory judgment was an equitable remedy present in English law and its precursors at least as early as the Fifteenth Century. Edwin M. Borchard, *The Declaratory Judgment, A Needed Procedural Reform, Part I*, 28 Yale L. J. 1, 12-14 (1918).[7] Historically, in deciding whether to act, courts of equity balanced the inadequacy of the remedy available in the other (common law) forum against the undesirability of usurping the law court's jurisdiction. Joseph Story, *Commentaries on Equity Jurisprudence*, § 33 (Reprint of 1836 ed.); John Norton Pomeroy, Jr., *Equity Jurisprudence*, §§ 39, 54, 132 (3d ed. 1905). If the petitioner's remedy at law was inadequate, the equity court would overcome its reluctance to intrude into the jurisdiction of the common-law court.[8] To assure justice

American Mfrs. Mut. Ins. Co. v. Edward D. Stone, Jr. & Assoc., 743 F.2d 1519, 1525 (11th Cir. 1984).

[7] Although "declaratory judgment actions" as such did not formally exist in England until codified in the 1850s, courts of equity awarded relief that would today be considered declaratory in nature long before the United States came into existence. Borchard, *Procedural Reform* at 12-14.

[8] Courts of equity needed the discretion to *deny jurisdiction* to avoid usurping the separate jurisdiction of the common-law courts. George L. Clark, *Principles of Equity with Supplement*, section 7 at 6 (1937). This power no longer exists due to Congress's exercise of its authority to define the jurisdiction of the federal courts. What remains is the discretion of federal courts, under limited circumstances, "to determin[e] whether to grant certain types of relief." *New Orleans Public Service, Inc.*, 491 U.S. at 359 (citations omitted).

and fairness for the petitioner, the equity court would then grant relief, even if the result of such relief was "piecemeal litigation" or other burdens on the parties or the court.[9]

The *Colorado River/Moses H. Cone* factors are rooted in these historic equitable concepts, but they apply somewhat differently in the modern context of a suit by an out-of-state party for declaratory relief in federal court. The competing forums are state and federal courts, not common law and equity courts (which are, of course, today merged).

Yet, the six *Colorado River/Moses H. Cone* factors reflect their equitable heritage. These factors elaborate on an equity court's two basic considerations: adequacy of the remedy available in each forum and the desire to avoid unduly inconveniencing the parties. *See, e.g., Phoenix Mut. Life Ins. Co. v. Bailey*, 80 U.S. (13 Wall.) 616 (1871) (dismissing equitable action where legal remedy is available); *Verner v. Elvies*, 6 Dict. of Dec. 4788 (1610) (Scottish decision dismissing claim on grounds of inconvenience to the parties). The factors direct that, in determining whether to abstain, a court should consider whether: (i) another court has first assumed jurisdiction over real property; (ii) the federal forum would be extremely inconvenient to the parties; (iii) abstention might avoid piece-meal litigation; (iv) another court has obtained jurisdiction first; (v) state law is the source of law; and (vi) the state remedy is inadequate. *Moses H. Cone*, 460 U.S. at 15-16.

Thus, there may be a basis for a federal court declining to grant or deny declaratory relief where another court's authority has been invoked first either with respect to real property (the first *Colorado River* factor), or generally

[9] For example, before granting relief on the merits under the Scottish action for declarator, the precursor to English declaratory law, Edwin M. Borchard, *Declaratory Judgments* 125 (2d ed. 1941) (hereinafter *"Borchard 2d"*), the Scottish court could require the plaintiff to show: (a) a substantial interest at stake; (b) the rights asserted are in dispute; and (c) the desired declaration would serve a useful purpose in deciding or settling a dispute with *res judicata* effect. *Id.* at 127.

(the fourth factor). In such cases, both traditional fears exist—that the second (federal) court would be unable to resolve the dispute definitively and that its involvement could severely prejudice the parties, such as by leading to piecemeal litigation. *See American Int'l Underwriters v. Continental Ins. Co.*, 843 F.2d 1253 (9th Cir. 1988) (third and fourth *Colorado River* factors favor abstention); *Flather v. United States Trust Co.*, —— F. Supp. ——, 1994 WL 376088 at *1-2 (S.D.N.Y. July 15, 1994) (first and third *Colorado River* factors favor abstention.[10] The determination whether to abstain, however, should be based on a careful review of the *Colorado River/Moses H. Cone* factors.

In contrast to a balancing of these traditional equitable considerations, the existence of a concurrent state court action cannot alone justify abstention. *Alabama Pub. Serv. Comm. v. Southern R. Co.*, 341 U.S. 341, 361 (1951) ("[I]t was never a doctrine of equity that a federal court should . . . dismiss a suit merely because a State court could entertain it") (Frankfurter, J., concurring). By preserving diversity jurisdiction and adopting the Declaratory Judgment Act, Congress created the possibility of concurrent suits. This was not an unintended consequence; the specific goal of these enactments was to provide out-of-state entities with a *federal* declaratory remedy. Thus, Congress weighed and resolved considerations of burden to the courts when it determined the scope of federal jurisdiction. To reopen these questions in the courts' evaluation of whether to exercise jurisdiction would improperly override Congress's mandate. While the ancient English chancellor may have struck whatever balance he thought just, the modern federal

[10] The fifth factor—the source of law—is also based on traditional equitable notions. If the common law supplied the adequate rule for decision, equity courts stayed their hand. *See e.g., Clark v. Lindemann & Hoverson Co.*, 88 F.2d 59, 60 (7th Cir.), *cert. denied*, 300 U.S. 681 (1937). Where the law of equity controlled, the courts of equity would retain jurisdiction even of a later-filed action and grant equitable relief. *See, e.g.*, John Norton Pomeroy, Jr., *Equity Jurisprudence*, §§ 181-82 (3d ed. 1905).

judge must implement Congress's determination that the court should entertain an out-of-state entity's claim for declaratory relief except in the special circumstances identified by the *Colorado River/Moses H. Cone* factors.[11]

B. The Lower Court Erred In Failing To Weigh The *Colorado River* Factors To Assess Whether Exceptional Circumstances Justifying Abstention Exist.

This Court has said that, in assessing whether circumstances are sufficiently "exceptional" to warrant abstention, "[n]o one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. Only the clearest of justifications will warrant dismissal." *Colorado River*, 424 U.S. at 818-19 (citation omitted). The Fifth Circuit failed even to address these factors. It eschewed this Court's test in favor of a circumstance that by definition is always present in *Colorado River* abstention cases. Essentially, the lower court determined that any federal court action for declaratory relief is presumptively invalid when a state court is available.

Here, even a cursory review of the *Colorado River/Moses H. Cone* factors reveals no exceptional circumstances and no clear justifications warranting dismissal. *Id.* at 819.

1. *Jurisdiction over real property.* The parties here are disputing insurance coverage, not the ownership of real property.
2. *Convenience of the respective forums to the parties.* Seven Falls, a Texas domiciliary, is not inconvenienced by having to litigate in the federal district court for the Southern District of Texas.
3. *Avoiding piecemeal litigation.* Had Seven Falls not filed the subsequent state court action, there would be no second suit. The federal action can

[11] In addition, where competing suits have been filed, a federal court might determine under another mechanism such as the doctrine of *forum non conveniens* that the case should not proceed. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

resolve all issues and no second suit is required. In any event, the mere existence of a later-filed state suit is insufficient to override the important federal policy embodied in the Act.[12]

4. *Order in which jurisdiction was obtained.* Lloyd's filed first. Accordingly, this factor strongly supports federal jurisdiction. While a district court plainly retains discretion to discourage improper tactical maneuvering, that is not what happened here. As soon as Lloyd's learned about the potential claim, it filed suit in federal court. In an effort to settle the dispute, that case was dismissed and then recommenced when Seven Falls notified Lloyd's of its intention to sue. By seeking resolution of this case in a federal forum in Seven Falls's home state, Lloyd's exercised a right that Congress granted to it in a dispute such as this one.

5. *Source of law.* That state law may control a case cannot mean that abstention is appropriate. Given this Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the federal courts in all diversity cases necessarily apply state law. Moreover, complex insurance coverage cases often first require a difficult determination as to choice of law. Federal courts are well-suited to this task, and to applying the law of a state other than the forum, if necessary.

6. *Inadequacy of the state proceeding.* Given Congress's grant to out-of-state parties of the right to litigate in a federal forum, a federal court may be required to exercise jurisdiction even if the state forum is adequate. This is particularly true where, as here, a foreign party is seeking access

[12] Should it somehow become necessary to join additional parties in a given matter, permissive federal joinder, *see* Fed. R. Civ. P. 20, and other procedural mechanisms could be used to include all of the necessary parties in the suit.

to the federal courts.[13] State court competence and proceedings are presumed to be adequate; they are not an "exceptional circumstance." *See, e.g., St. Paul's Ins. Co. v. Trejo*, 39 F.3d 585, 589 (5th Cir. 1994). However, an inadequate state law forum *always* requires the exercise of federal jurisdiction.

C. Routine Abstention From Suits For Federal Declaratory Relief By Out-of-State Entities Would Yield Perverse Consequences.

As the course of events here illustrates, the lower courts' approach gives rise to many adverse practical consequences. First, routine abstention in favor of a state proceeding amounts to "reverse-removal," essentially negating 28 U.S.C. section 1441. Second, the lower courts' approach would encourage "gaming" tactics and cause more litigation, not less. Third, routine abstention would encourage parties seeking to defeat diversity to draw in peripheral non-diverse parties that might otherwise be absent from the litigation.

Congress granted diversity jurisdiction, complemented by the right of removal to out-of-state defendants, "to protect nonresidents from the local prejudices of state courts." 14A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, section 3721 at 187 (1985).[14] Congress permits out-of-state entities to have some say in where

[13] *See* S. Rep. No. 1830, 85th Cong., 2d Sess. 4 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3099; *see also* American Law Institute Study of the Division of Jurisdiction Between State and Federal Courts 108 (1969) ("[I]t is important in the relations of this country with other nations that any possible appearance of injustice or tenable ground for resentment be avoided. This objective can best be achieved by giving the foreigner the assurance that he can have his cases tried in a court with the best procedures the federal government can supply and with the dignity and prestige of the United States behind it").

[14] That defendants may not remove cases brought in their home state demonstrates that protection against local bias is precisely the purpose of the right to remove. 28 U.S.C. section 1441(b).

their case is heard. But the approach below automatically deprives an out-of-state litigant of the federal forum Congress authorized. It amounts to "reverse-removal," *i.e.*, permitting an in-state defendant to "trump" a federal suit with a later-filed suit in its home state court.

In fact, that is precisely what happened here. Lloyd's sued in federal court as soon as it learned about the underlying claim. In reliance on the policyholder's promise to inform Lloyd's before it filed any coverage action, Lloyd's voluntarily dismissed its federal action to facilitate settlement discussions. As soon as it learned that the policyholder planned to sue in state court, Lloyd's recommenced this action. Seven Falls then crafted a suit in state court that defeated removal. Lloyd's Brief at 6 (seeking to defeat Lloyd's right to have this case heard in a federal forum, "the Hills misjoined in their later Travis County suit wholly unrelated causes of action by the Winkler County co-defendants against those parties' own insurers."). The Fifth Circuit's decision to defer automatically to the state forum, without even evaluating the traditional factors that define whether abstention is appropriate, rewarded Seven Falls's forum-shopping. As this case illustrates, the approach taken below would encourage "gaming" tactics and lead to more litigation, not less.

In addition, the lower courts' approach would create an incentive for the party seeking to avoid a neutral federal forum to unjustifiably join peripheral or even fraudulently implicated non-diverse parties to defeat removal. *See Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 101-02 (5th Cir.), *cert. denied*, 498 U.S. 817 (1990); *Haines v. National Union Fire Ins. Co.*, 812 F. Supp. 93, 96 (S.D. Tex. 1993). A policyholder seeking to avoid a federal forum might implead a local insurance agent or other unrelated party. In short, individuals who might otherwise be absent from the litigation would be drawn into it for purely tactical reasons.

Lloyd's was willing to litigate this case in Seven Falls's home state. Lloyd's merely sought the protection of federal court, guaranteed to it by Congress. The lower courts here apparently believed that insurance coverage actions should be litigated in state courts only. Not only is that approach in conflict with Congress's mandate, but it would result in practical litigation problems as well. The decision below should, accordingly, be reversed.

II. PERMITTING ROUTINE ABSTENTION THWARTS CONGRESS'S LONGSTANDING DETERMINATION THAT THE FEDERAL COURTS HAVE JURISDICTION TO ENTERTAIN DECLARATORY JUDGMENT ACTIONS BETWEEN DIVERSE PARTIES.

Since the founding of the Republic, Congress has vested the federal courts with the responsibility of ensuring fairness in litigation between a local entity and an out-of-state party, whether foreign or domestic. In enacting diversity jurisdiction, Congress exercised a power expressly granted it in the Constitution. Although frequently attacked before Congress and in the courts, diversity jurisdiction remains an integral part of our federal system. In 1934, responding to the needs of the insurance industry, among others, Congress authorized federal courts to grant out-of-state and foreign parties declaratory relief in diversity cases. The balance Congress struck between the roles of federal and state courts would be upset if district courts were given virtually unlimited discretion to abstain from exercising jurisdiction.

A. The Concerns Giving Rise To Diversity Jurisdiction Demonstrate The Importance Of Affording Diverse Parties A Federal Forum.

The Framers, concerned about the fairness and quality of state courts, authorized Congress to vest federal courts with diversity jurisdiction. Diversity jurisdiction would ensure that the nation spoke with one voice on issues affecting foreign relations, promote national unity, and encourage commerce by making a federal court available to foreign merchants and other property owners.

1. *The Framers Of The Constitution Recognized The Need For A Federal Remedy For Diverse Parties.*

The Constitutional Convention in 1787 was keenly aware of the state courts' selective enforcement of national policies. State courts had routinely ignored the Treaty of Paris in 1783 with Great Britain. North Carolina, for example, barred former Loyalists from suing in state courts for the payment of debts—an outright breach of the Treaty. Catherine D. Bowen, *Miracle at Philadelphia* 220 (1986). Similar treaty violations occurred throughout the Confederation. Nine states exiled their Loyalists, while five disenfranched them. *Id.* And, although the Treaty of Paris directly prohibited prosecutions for actions taken during the Revolutionary War, state court dockets were filled with treason prosecutions of Loyalists. *Id.* at 221. Moreover, state legislatures regularly enacted laws that benefitted residents, to the detriment of out-of-state and foreign interests, particularly creditors.[15]

Given this background, the delegates were highly conscious of the inadequacies and prejudices of the state courts. As one delegate noted, "the Courts of the States can not be trusted with the administration of the National laws." J. Madison, *Notes of Debates in the Federal Convention of 1787* 319 (Norton 1987) (comments by Randolph) (hereinafter "*Notes*"). Accordingly, all of the comprehensive proposals for a new federal constitution provided for a national judiciary. Charles C. Tansill, *Documents Illustrative of the Formation of The Union of American States*, H.R. Doc. No. 398, 69th Cong., 1st

[15] For example, Virginia and North Carolina adopted laws making debtors almost impossible to reach. 8 Henning (Va. Stat.) 401, 402; Bowen, at 220. State admiralty judgments also were biased in favor of local interests. *United States v. Judge Peters*, 9 U.S. (5 Cranch) 115, 131 (1809). New Hampshire statutes allowed certain in-state litigants to secure review of judgments, even where the time for taking such action had expired. *Penhallow v. Doane's Administrators*, 3 U.S. (3 Dall.) 54, 62 (1795).

Sess. 955, 965, 968, 980 (1926). All but one proposal provided for federal jurisdiction over cases involving foreigners. *Id.* at 955, 968, 980. The Virginia plan, which served as the convention's template, specifically vested in the federal courts authority over cases in which "citizens of other states" may be interested. *Notes*, at 32.

Madison feared "what was to be done after improper Verdicts in State Tribunals obtained under the biassed [sic] directions of a dependent Judge, or the local prejudices of an undirected jury." *Id.* at 72. The Convention apparently shared these fears; it adopted the diversity jurisdiction provision without challenge.[16]

2. *The Ratification Debates Demonstrate The Importance Of A Federal Remedy For Diverse Parties.*

The Anti-Federalists vigorously opposed the proposal to give federal courts authority over suits between citizens of different states. Diversity jurisdiction, they argued, would unduly impinge on the state courts, lead to the application of federal law to state causes of action, and require oppressive costs to defend federal cases, particularly on appeal. James William Moore & Donald J. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Tex. L. Rev. 1, 4 (1965).

Federalists responded that the integrity of the Union required broad jurisdiction for the federal courts. Among others, Alexander Hamilton strongly defended the need for the judicial authority of the union to extend "to all those [cases] which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse be-

[16] James William Moore & Donald J. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Tex. L. Rev. 1, 3 (1965). Ultimately, the proposed Constitution stated that the "judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const., Art. III, sec. 2.

tween the United States and foreign nations, or to that between the states themselves." Alexander Hamilton, James Madison & John Jay, *The Federalist Papers,* No. 80, at 403 (Bantam 1982) (1787-88) (Hamilton).

James Madison concurred. Referring to local courts during the Virginia convention on ratification, he remarked: "We well know, sir, that foreigners cannot get justice done them in these courts . . . ." 3 Jonathan Elliot, *Elliot's Constitutional Debates* 583 (2d ed. 1836) (Madison) (hereinafter "Elliot"). Foreign merchants' justifiable fear of biased state tribunals, Madison said, had "prevented many wealthy gentlemen from trading or residing among us." *Id.*[17]

The Framers feared that local bias against foreigners could easily turn into bias against citizens of other States. John P. Frank, *Historical Bases of the Federal Judicial System,* 13 Law & Contemp. Probs. 3, 27 (Winter 1948) (hereinafter "*Historical Bases*"). The Framers therefore afforded similar protection to out-of-staters. As Hamilton put it, federal courts needed jurisdiction over those cases "in which state tribunals cannot be supposed to be impartial," such as cases between citizens of different states. *The Federalist Papers,* No. 80, at 405 (Hamilton).

The structure and quality of state judiciaries also concerned the Framers. Madison spoke of the "tardy, and even defective, administration of justice . . . in some states." Elliot, at 533. Federalists were suspicious of state court judges, who were generally selected by and under the influence of the legislature, poorly paid, and in

[17] In general, Article III was part of a comprehensive appeal to "most men of property." John P. Frank, *Historical Bases of the Federal Judicial System,* 13 Law & Contemp. Probs. 3, 14 (1948). Chief Justice Taft, for one, thought that Article III had been successful in that regard. When opposing changes to diversity jurisdiction in 1928, he told the American Bar Association that "no single element in our governmental system has done so much to secure capital for the legitimate development of enterprise, throughout the West and South," as diversity jurisdiction. A. T. Mason, *William Howard Taft: Chief Justice* 127 (1964).

office for a very short time. Felix Frankfurter, *Distribution of Judicial Power Between United States And State Courts,* 13 Corn. L. Q. 499, 520 (1928).[18] "State judges holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws." *The Federalist Papers,* No. 81, at 412 (Hamilton). Placing diversity suits in federal court, it was believed, would protect aliens and out-of-staters from discriminatory treatment by the state legislatures and thus encourage commerce, among other things. *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 Harv. L. Rev. 483, 495 (1928) *citing Elliot,* at 282.

3. *Congress's Enactment And Steadfast Retention Of Diversity Jurisdiction In The Face Of Numerous Challenges Demonstrates Its Commitment To Affording A Federal Forum To Diverse Parties.*

Exercising its mandates under Article III of the Constitution,[19] when the First Congress convened in 1789, it immediately created the federal courts and vested them with jurisdiction in cases "where an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another state." Judiciary Act of 1789, Ch. 20, § 11-12, 1 Stat. 73, 78, 79. As Justice Story explained, Congress implemented the judgment, reflected in the Constitution, that the possibility of state bias

[18] Legislatures were responsible for appointing judges in every state except Pennsylvania and Maryland. For a general discussion of the political influences on early state judiciaries, *see* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction,* 41 Harv. L. Rev. 483, 497 (1928).

[19] The Constitution left it to Congress to decide whether to create inferior federal courts and, if so, how much authority to vest in such tribunals. *See Turner v. Bank of America,* 4 U.S. (4 Dall.) 8, 10 (1799); *see also Federalist Papers,* No. 80, at 408 (Hamilton) ("the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations" as necessary to solve jurisdictional "inconveniencies" [sic]).

made a neutral federal forum necessary under certain circumstances.

> The Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control . . . the regular administration of justice. Hence, in controversies . . . between citizens of different states . . . it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816).[20]

In fulfilling its constitutional responsibility, Congress has often reexamined diversity jurisdiction. Few areas of the administration of civil justice have been as frequently scrutinized. Although the availability of diversity jurisdiction has at times been limited,[21] Congress has preserved and reaffirmed its central and original feature: that citizens of different states or countries are given the right to sue in federal court.

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[20] This Court has also said that diversity jurisdiction helps guard against the perception of state bias, *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87-88 (1809) (Marshall, C.J.) and promotes national unity, *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 354 (1855); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 580 (1856) (Curtis, J., dissenting).

[21] Currently codified as 28 USC 1332. In all, Congress has amended the statute at least thirteen times. R.S. § 563, 629; c. 137 § 1, 18 Stat. 470 (1875); c. 373 § 1, 24 Stat. 552 (1887) (raised limit to $2,000); c. 866 § 1, 25 Stat. 433 (1888); c. 231 § 24 para. 1, 36 Stat. 1091 (1911) (raised limit to $3,000); c. 283 § 1, 48 Stat. 775 (1934); c. 726 § 1, 50 Stat. 738 (1937); c. 117, 54 Stat. 143 (1940) (added D.C., Hawaii and territories); c. 646, 62 Stat. 930 (1948); c. 740, 70 Stat. 658 (1956) (added Puerto Rico); P.L. 85-554, § 2, 72 Stat. 415 (1958) (raised limit to $10,000, and clarified corporate citizenship); P.L. 94-583, § 3, 90 Stat. 2891 (1976) (clarified status of foreign states); P.L. 100-702, 102 Stat. 4642 (1988) (raised limit to $50,000).

The right of an out-of-state entity to remove a case to federal court provides further evidence of Congress's desire to afford such parties the right to litigate in a federal forum. 28 U.S.C. § 1441. Removal has been part of American law since the Judiciary Act of 1789, and was considerably expanded after the Civil War. 14A Wright, Miller & Cooper, section 3721 at 187. Although since narrowed somewhat, removal remains an important, complementary tool to ensure the availability of a federal forum to out-of-state litigants.

The frequency and force of the attacks on diversity jurisdiction underscore that fixing the federal courts' role in litigation between local and alien parties is a political judgment and not simply a matter of judicial administration. Political judgments are the domain of Congress, not the federal judiciary.

Among others, Justice Frankfurter clearly understood the difference between what the federal judiciary may want in this regard and what it may permissibly do. Despite his call for the complete abolition of diversity jurisdiction by Congress, *Burford v. Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting), Justice Frankfurter recognized that such determinations were "not my concern as a judge. They are the concern of those whose business it is to legislate, not mine." *Id.* at 337.

The rule adopted by the courts below, which would routinely and arbitrariiy allow federal courts to deny worthy "suitor[s] access to a federal court" due to a later-filed state action, "disregard[s] a duty enjoined by Congress and made manifest by the whole history of the . . . United States courts based upon diversity of citizenship between parties." *Id.* at 336. The power to restrict diversity jurisdiction resides only with Congress, not individual district judges.

B. By Enacting The Declaratory Judgment Act, Congress Granted Out-Of-State And Foreign Parties The Right To Seek Declaratory Relief In Federal Court.

Where federal court jurisdiction exists, the Declaratory Judgment Act affords an opportunity to settle disputes in federal court when they first arise, before the parties have taken irrevocable actions or incurred avoidable costs and liabilities. Edwin M. Borchard, *Declaratory Judgments* xiii-xvi (2d ed. 1941). The Act was intended to provide foreign and out-of-state parties, such as Lloyd's, the ability to seek declaratory relief in federal courts. Congress understood that such relief gives insurers some influence over their own destiny by enabling them to file suit first, choose the forum in which their cause will be heard, and avoid potentially biased state juries.[22]

Insurers have long favored declaratory relief. Although declaratory actions were not formally introduced into American jurisprudence until 1915, insurers among others immediately saw the advantage of such relief to them and their policyholders.[23] To illustrate, in the life insurance context "neither party should be obliged to wait until the death occurs to find out whether the policy is valid or void." *Borchard 2d*, at 638. The seminal case on the

[22] *Declaratory Judgments: Hearing on H.R. 5623 Before a Subcommittee of the Senate Committee on the Judiciary*, 70th Cong., 1st Sess. 73 (1928) (Submission by Edwin Borchard) (anticipating that the main claims arising under the Act would involve the "construction of mortgages, deeds, contracts, . . . insurance policies and documents of all types"); *Borchard 2d*, at 634-35 (When an insurance company "is a defendant or co-defendant with the insured, juries are apt to be swayed by sympathy and be partial to the plaintiff; hence insurers have found great advantage in . . . obtaining a declaratory judgment in an independent action . . . ."); *see also id.* at 647-48.

[23] Charles Alan Wright, *Law of Federal Courts* 672 (4th ed. 1983) ("Declaratory judgments are probably sought most often in insurance and patent litigation"); Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958* 212 (1992) ("the declaratory judgment was particularly useful to the insurance industry").

justiciability of declaratory judgment actions is an insurance case. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941).

By 1934, more than half the states had enacted statutes that provided some form of declaratory relief. S. Rep. No. 1005, 73rd Cong., 2d Sess. 4 (1934) ("Since 1919, 34 States and Territories of the Union have enacted the declaratory judgment statute."). Congress realized the importance of making declaratory relief available in the federal courts. The first proposal to create a federal declaratory remedy was in 1919. S. 5304, 65th Cong., 1st Sess. (introduced Jan. 7, 1919). It was introduced each year thereafter. As soon as doubts about its constitutionality were resolved, Congress enacted the Declaratory Judgment Act in 1934.[24]

Congress was aware that a federal declaratory judgment action could result in concurrent suits being brought in both federal and state courts. In that event, Congress apparently intended that declaratory actions proceed to judgment.

> [I]f they [state complainants] got their suit put through first, they would get their judgment in the suit. If on the other hand, the declaratory judgment was rendered first, it would be final res adjudicata between the parties and the [state] suit would become unnecessary.

Hearing on H.R. 10143 Before the House Committee on the Judiciary, 67th Cong., 2d Sess. 7 (1922) (Statement

[24] In 1933, the Supreme Court unanimously decided that declaratory judgment actions were appropriate as long as a "real and substantial" issue exists between adversary parties. *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933). The 73rd Congress then passed the federal Declaratory Judgment Act without any hearings and with little discussion. In fact, during the brief floor debate, the Chairman of the Senate Judiciary Committee merely referenced prior hearings for support. 78 Cong. Rec. 10565 (1934) (remarks of Senator King). Thus, the actual congressional deliberations on declaratory relief can be found in the prior hearings and the floor discussions of earlier proposals.

of Henry W. Taft, Chairman of the Committee on Jurisprudence and Law Reform of the American Bar Association).[25]

Congress also knew that allowing federal courts to provide declaratory relief could substantially increase the burden on the federal judiciary. During the floor debates, Representatives repeatedly voiced their concern that this Act would burden the federal courts.[26] Overall, Congress believed that the benefits of such a new form of relief, for insurers among others, *Hearing on H.R. 5623,* 70th Cong., 1st Sess. 51 (1928), outweighed any burden on the federal bench resulting from the Act.[27]

Congress passed that Act recognizing that it could lead to concurrent state and federal litigation, and that it had the potential to accelerate access to the federal courts. Congress also knew that its action affected the balance of power between state and federal courts.[28] In this case,

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[25] *See also* 69 Cong. Rec. 2029 (1928) (remarks of Rep. LaGuardia, quoting from *Kings County Trust Co. v. Melville,* 216 N.Y.S. 278 (1926)). (" 'It is doubtful whether [a trial court] will enter declaratory judgment after a court of coordinate jurisdiction has already entered an order which is res judicata upon these parties, since the court may decline to pass declaratory judgment 'for other reasons.' ' "). One Representative even believed that a subsequently filed declaratory action should bar the original state court action. *See, e.g.,* 69 Cong. Rec. 2028 (remarks of Mr. Dempsey) (Upon the filing of a declaratory judgment action in federal court, "[a]ll [the first] court could do is to discontinue your first action.").

[26] *See, e.g.,* 69 Cong. Rec. 1681 (remarks of Rep. Johnson) ("If either party during a preliminary stage of a controversy can bring the matter into court, and thereafter there may be further litigation before the rights of the parties are determined, would you not have doubled the volume of litigation . . . [I]t seems to me you will have an increased volume of litigation.")

[27] Declaratory relief, it was said, would result in the "expedition, economy, and simplification of judicial procedure." 78 Cong. Rec. 8224 (1934) (remarks of Rep. Montague, sponsor of the 1934 Declaratory Judgment Act).

[28] When Congress passed the Declaratory Judgment Act in 1934, federal common law controlled the disposition of cases in federal court. *See Swift v. Tyson,* 41 U.S. (16 Pet.) 1 (1842). Congress

the lower courts violated the Act's purpose in deferring to a later-filed state action on the grounds that declaratory relief "would result in the piecemeal adjudication of the plaintiffs['] and defendants' coverage dispute and would reward plaintiffs' attempts to forum shop." *Wilton,* Joint App. 25.

III. THE CONCERNS LEADING CONGRESS TO ENACT DIVERSITY JURISDICTION AND THE DECLARATORY JUDGMENT ACT REMAIN OPERATIVE TODAY.

The concerns that motivated the Founders to vest diversity jurisdiction in the federal courts and Congress to adopt the Declaratory Judgment Act still exist today. Studies repeatedly show that lawyers, and even federal judges, continue to perceive state court bias against out-of-state and alien interests, particularly those with "deep pockets."

The experience of insurers in state courts confirms this impression. Although most state judges work in good faith to achieve just results, insurers continue to experience injustices apparently explainable only by a bias against out-of-state corporations. In addition, state courts are more crowded and generally less well-equipped. Thus, practical reasons support what Congress has required: absent truly exceptional circumstances, federal courts should entertain requests by out-of-state entities for declaratory relief.

A. Out-Of-State And Foreign Parties Perceive Some State Courts As Continuing To Manifest Bias Against Them.

Authoritative studies have repeatedly documented the widespread perception that state courts are biased against out-of-state and foreign parties. One comprehensive 1992 study reported that fifty-four percent of *plaintiffs'* attorneys reported bias against defendants in state court. Neal

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apparently believed making this remedy available in federal court was so important that it was justified even if its invocation was outcome-determinative.

Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 408-09 (Winter 1992). More than half of such plaintiffs' lawyers (51%) ascribed this bias to the defendant's out-of-state status. *Id.* Slightly less than half (45%) explained that the defendant's identity as a business or corporation gave rise to prejudice.[29] Almost half (45%) of plaintiff's lawyers chose to litigate in state court based on their belief that the state court would be biased in their favor. *Id.* Not surprisingly, perhaps, attorneys representing insurance companies were most likely of all defense attorneys to report out-of-state bias (59%). *Id.* at 413.[30]

Judges share this perception of prejudice. A 1992 survey conducted by the Federal Judicial Center found that many federal judges believe state courts still are biased against non-resident litigants. Forty-eight percent of circuit judges and 40% of district judges believed that state court bias was at least somewhat of a problem. Federal Judicial Center, *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges*, at 4, 26 (1994). Thus, it appears that the perception of state court bias that motivated the adoption of federal diversity jurisdiction remains.

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[29] A Minnesota study also found bias against the nature of the client to be the most important reason lawyers pursued their remedy in federal court. The third most important reason was prejudice against out-of-state interests. Douglas D. McFarland, *Diversity Jurisdiction: Is Local Prejudice Feared?*, 7 Litigation 38, 40 (Fall 1980).

[30] Other studies have reported similar results. A Virginia survey found that more than 60% of attorneys said that local prejudice against out-of-state plaintiffs was a reason for choosing federal courts. Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 Va. L. Rev. 178, 179 (1965). Forty percent of Chicago lawyers believed that fear of local prejudice was at least somewhat important in choosing federal court. K. Marks, *Honors Paper at Northwestern University*, printed in *Hearings on H.R. 9622 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 265, 267 (1978).

In reality as well as perception, insurers have repeatedly been subjected to judicial determinations that appear explainable only by a state court's desire to find a deep pocket to reimburse local policyholders. This is especially true in cases addressing the availability of insurance coverage for large environmental clean-up projects. Such decisions have been strongly encouraged by local interests that may be harmed by pollution.

For example:

- The Wisconsin Assembly Committee on Natural Resources recently wrote the Wisconsin Supreme Court asking it to reconsider its insurance coverage decision on public policy grounds. A decision denying coverage, the Committee said, would "have a serious adverse effect upon state efforts to remediate contaminated sites." Letter from Wisconsin Assembly Committee on Natural Resources to Chief Justice Nathan S. Heffernan, Wisconsin Supreme Court (Aug. 4, 1994) (regarding *City of Edgerton v. General Casualty Co.*, 517 N.W.2d 463 (Wis. 1994)).
- The Pennsylvania Attorney General urged the Pennsylvania Superior Court to affirm the trial court, in part "[b]ecause this is an age of limited public finances, [and] this funding must come from the private sector, . . . in this instance funds should flow both from manufacturers and from the insurance industry . . . ." Brief of *Amicus Curiae* of Commonwealth of Pennsylvania, Department of Environmental Resources at 1-2, *Lower Paxton Township v. United States Fidelity and Guar. Co.*, 557 A.2d 393 (Pa. Super. Ct. 1989) (No. 141 Harrisburg 1988).[31]

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[31] *See also* Supplementary Brief of Respondent State of New Jersey, Department of Environmental Protection at 3, *State of New Jersey v. Signo Trading Int'l, Inc.*, 570 A.2d 980 (N.J. 1989) (No. 30,960), *aff'd*, 612 A.2d 932 (1992). (New Jersey's Department of Environmental Protection urged the New Jersey Supreme Court to decide an insurance coverage case in a manner "that will be consistent with the state's broad responsibility to remediate past contamination. . . .").

Perhaps in part because of these types of entreaties, state courts have at times succumbed to the temptation to have out-of-state and foreign insurers pick up the tab for cleaning up the environmental mess in their own backyard. *See, e.g., Summit Assocs.*, 550 A.2d at 1239 (reversing trial court holding that "the health, safety and welfare of the people of this State must outweigh the express provisions of the insurance policy at issue"). Yet, the orderly workings of insurance as an international economic mechanism allowing society to absorb massive risks depends on the reliability of insurance policy terms. In some recent state court cases, however, these considerations have taken a backseat to the desire to fund large local expenditures from an out-of-town source.

A few prominent examples demonstrate that state court bias remains a valid concern today:

- In *Greenville County v. Insurance Reserve Fund*, 443 S.E.2d 552 (S.C. 1994), the South Carolina Supreme Court held that, because there is more than one meaning listed for the word "sudden" in the dictionary, the term is ambiguous and must be construed against the insurer. *Contra MCI Telecommunications Corp. v. AT&T Co.*, 114 S. Ct. 2223, 2229-31 (1994).

- In *Morton International, Inc. v. Insurance Co. of North America*, 629 A.2d 831 (N.J. 1993), *cert. denied*, 114 S. Ct. 2764 (1994), the New Jersey Supreme Court barred insurers from ever enforcing an exclusion that had been part of many insurance agreements since 1970, when it had been approved by New Jersey's insurance regulators. The court based its "findings," that insurers had duped the regulators into allowing the exclusion, on biased and partisan articles written by counsel for policyholders. These articles and other materials were submitted for the first time on appeal, and were never subjected to discovery, cross-examination, or any of the other rules of evidence.

- In *West American Ins. Co. v. Tufco Flooring East, Inc.*, 409 S.E.2d 692, 698-700 (N.C. Ct. App. 1991), *review dismissed*, 420 S.E.2d 826 (N.C. 1992), the North Carolina Court of Appeals held that despite a policy provision defining "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant including smoke, [or] vapor . . . ," "vapors emanating from the flooring material" remarkably were not "pollutant[s]."

- In *Duhon v. Nitrogen Pumping & Coiled Tubing Specialists, Inc.*, 611 So. 2d 158 (La. Ct. App. 1992), despite a provision barring coverage for all actions that "result from the Assured's intentional and willful violation of any government statute, rule or regulation," the court found coverage for a suit in which the underlying claimants alleged that the policyholder was guilty of illegal and intentional pollution. *Id.* at 160 (Stoker, J., dissenting).

As these cases demonstrate, insurers have reason to persist in the belief that access to a federal forum is needed.[32] Moreover, insurers face the same problem outside the environmental context. Most notably, state courts have abused the interpretive principle that contracts are construed against the drafter to justify anti-insurer rulings that simply ignore the terms of the agreement. For example, in *Ponder v. Blue Cross*, 193 Cal. Rptr. 632 (Ct. App. 1983), a California appellate court held that a claimant could recover for costs relating to treating TMJ (temporomandibular joint syndrome) despite a provision in her policy stating that benefits would not be provided

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[32] *See also* Willy E. Rice, *Judicial Bias, The Insurance Industry And Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad Faith, Breach Of Contract, Breach-Of-Covenant-Of-Good-Faith And Excess-Judgment Decisions, 1900-1991*, 41 Cath. U. L. Rev. 325, 331 (Winter 1992) ("[T]hese supreme tribunals allow extralegal factors, which have little to do with the merits of the suits, to influence the disposition of insurance-related cases"); *see also id.* at 369 ("[S]tate supreme court justices unintentionally allow the types of insureds to influence the disposition of . . . actions).

for "the treatment of temporomandibular joint syndrome or disease." *See also, e.g., Northwest Airlines, Inc. v. Globe Indem. Co.*, 225 N.W.2d 831, 837 (Minn. 1975) (holding that "the very fact that the [parties'] respective positions as to what this policy says are so contrary compels one to conclude that the agreement is indeed ambiguous. The rule is well settled that ambiguous language should be strictly construed in favor of the insured.").

In recognition of the risk of local prejudice, Congress gave insurers such as Lloyd's the right to seek declaratory relief in a federal forum. The existence of that remedy is of real and continuing value. It helps promote the operation of national and international insurance business, with all of its benefits. It also aids commerce generally. This Court should not adopt an approach that would allow federal district courts to override that congressional determination.

B. State Courts Are In No Better Position To Hear Complex Environmental Coverage Actions Than Are Federal Courts.

Complex environmental cases involving numerous parties and high stakes are appropriate to resolution by the federal courts. As discussed above, environmental coverage cases frequently involve many parties, numerous geographically dispersed polluted sites, the law of multiple jurisdictions, and high stakes.[33] While state courts may be capable of handling such suits, these are precisely the types of cases over which the federal courts should exercise jurisdiction. Yet the rule adopted below would have fed-

[33] To illustrate, more than $100 billion is at issue in the debate over the meaning of a single insurance provision—the pollution exclusion. Gary Spencer, *Pollution Coverage Suit Reinstated Against Insurer*, N.Y.L.J., Nov. 15, 1989, at 1. The question of who will pay to clean up America is a $480 billion to $1 trillion controversy. Milton Russell, E. William Colglazier, & Mary R. English, *Hazardous Waste Remediation: The Task Ahead* 15-16 (University of Tennessee Waste Management Research & Education Institute Dec. 1991).

eral courts abstain almost automatically from hearing such cases upon the subsequent filing of a claim in state court.

Federal courts are widely perceived as more suited to complex disputes. In one Chicago survey, ninety-two percent of lawyers ranked the ability of federal judges as the primary reason to litigate in federal courts. K. Marks, *Honors Paper at Northwestern University*, printed in *Hearings on H.R. 9622 Before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 265 (1979). In the same survey, the second reason, cited by ninety percent, was the federal courts' more current calendar. *Id.* Federal courts are faster than state courts. While most states disposed of fewer cases than were filed with them from 1990 to 1992, National Center for State Courts, *State Court Caseload Statistics, Annual Report 1992*, at 13 (1994), federal courts have cleared more cases than have entered their system three of the last five years. Administrative Office of U.S. Courts, *Selected Reports*, Annual Report of the Director at 7 (1993).

Federal courts should not succumb to the temptation to defer to a later-filed state action based on the excuse that they are "too busy." *See generally Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336, 344 (1976) (courts may not refer a case to a state court under the doctrine of *forum non conveniens* merely "because the district court considers itself too busy."). As busy as the federal courts may be, the state courts are more burdened. "Civil and criminal case filings are rising much more rapidly in state courts than in federal courts." *State Court Caseload Statistics* at 44. The state general jurisdiction judiciary handles over 83 times as many criminal cases and 41 times as many civil cases with only 15 times as many judges as the federal judiciary. *Id.*[34]

[34] *See* Chief Judge Judith S. Kaye, "Federalism Gone Wild," N.Y. Times at A-29 (Dec. 13, 1994) (Reducing federal jurisdiction by limiting diversity and other restrictions "would serve the in-

CONCLUSION

By adopting diversity jurisdiction, providing for removal, and enacting the Federal Declaratory Judgment Act, Congress decided federal courts should be available for declaratory relief brought by out-of-state parties. This Court should therefore make clear that district courts may abstain only after a searching review of the *Colorado River/Moses H. Cone* factors. The existence of a concurrent state proceeding cannot be a sufficiently "exceptional circumstance" to warrant abstention. Thus, the decisions below should be reversed, and this case remanded with instructions to vacate the order of dismissal and recommence the litigation.

Respectfully submitted,

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stitutional interest of the Federal judiciary, but it would not be in the interest of the millions who turn every year to the state courts seeking fair and efficient resolution of their cases.").